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No. 770

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

AMERADA PETROLEUM CORPORATION, *Petitioner*

v.

BETTYE M. MARSHALL, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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AMERADA PETROLEUM CORPORATION, *Petitioner*

v.

BETTYE M. MARSHALL, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on July 31, 1967.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the District Court (R. 95-99) is unreported (App. B., *infra* pp. 16-20). The opinion of the Court of Appeals (R. 109-113) (App. A., *infra* pp. 11-14) is reported at 381 F.2d 661.

JURISDICTION

The judgment of the Court of Appeals was entered on July 31, 1967, (R. 109). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

When a United States District Court obtains jurisdiction, in an action under the Federal Declaratory Judgment Act, brought in the defendant's residence city, which is the plaintiff's only available forum, and the defendant brings a later action, which she had previously threatened to bring, in another United States District Court involving exactly the same parties and issues, may the first court refuse to hear the prior action where both actions are equally capable of deciding the controversy?

STATUTE AND RULE INVOLVED

The statute and rule involved are the Declaratory Judgment Act, 28 U.S.C. Sections.2201-2202, and Rule 57, Fed. R. Civ. P., which provide as follows:

> Declaratory Judgment Act, 28 U.S.C. §§2201-2202:
>
> §2201. In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
>
> §2202. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been

determined by such judgment.

Rule 57, Fed. R. Civ. P.
Declaratory Judgments

The procedure for obtaining a declaratory judgment pursuant to Title 28 U.S.C., §2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

STATEMENT

This is a diversity action for a declaratory judgment that defendant does not own an interest, which she has asserted, in Amerada's past, present, and future oil production in the Kingdom of Libya.

In 1948 Amerada and two other oil companies formed, as equal owners, a service corporation to investigate potential foreign petroleum sources (R. 6-19). Its first president received a substantial salary and the right to earn participating interests in production from certain concessions acquired by negotiations initiated during his presidency (R. 22-23). Company obligations with respect to his rights were separate, not joint (R. 25).

The president assigned part of his participation right to respondent (R. 29-35), Miss Bettye M. Bo-

hanon (now Mrs. J. Howard Marshall), and upon terminating his employment in 1954, he and the companies executed a written delineation of countries where his participating interests would mature if petroleum was produced (R. 78-79). Mrs. Marshall declined to sign.

Libya was excluded from the delineation instrument (R. 78-79), but the companies later acquired concessions in Libya, where great petroleum sources were eventually discovered. In 1963, through her Washington, D. C., attorney, Mrs. Marshall asserted an interest in Libyan production (R. 79, 88), and in 1964 threatened Amerada with legal action (R. 79, 91). Although all three companies could have been sued in her residence city of Houston, Texas, she brought suit against the other two in Washington, D. C., where Amerada could not be joined (R. 52-57). Having heard nothing since 1964, Amerada resolved early in 1966 to seek a declaratory judgment and retained counsel for the purpose (R. 80-81). While completing initial research and drafting of pleadings, Amerada received on March 8, 1966, a letter from Mrs. Marshall's New York attorneys again threatening suit and urging Amerada to waive lack of jurisdiction and voluntarily submit the controversy to the Washington, D. C. Court (R. 71-72). Later in March, being determined to avoid the delay of the Washington, D. C. proceedings, Amerada filed suit in the United States District Court in Houston, as planned (R. 3-5).

For the convenience of Mrs. Marshall's Houston attorneys, Amerada stipulated to extend the answer

date to May 9 (R. 36-37). On that date, she answered and moved to dismiss, transfer, or stay the declaratory action (R. 38-44). Her New York attorneys simultaneously filed an accounting action against Amerada in the United States District Court for the Southern District of New York, which Amerada moved the Houston court to enjoin (R. 74-75).

The Houston Court denied the motion to dismiss the declaratory action because it had been properly brought under the Federal Declaratory Judgment Act. It denied the motion to transfer because the "declaratory judgment action might not have been instituted either in the District of Columbia or in the Southern District of New York by Amerada against Mrs. Marshall, nor is the doctrine of forum non conveniens available, as there is no alternative forum wherein Amerada might have filed the suit." (R. 98). It did nonetheless stay the declaratory action until final adjudication of the later New York action, enjoined Amerada from proceeding in Houston, and denied Amerada's motion for an injunction against the later New York action. Regarding the question before it as essentially involving a choice of forums, although having recognized the precise equality of the parties and issues in both actions and the inapplicability of forum non conveniens, the Court held that the defendant "Mrs. Marshall is the *real plaintiff* and *her* choice of forums is not to be lightly set aside." (R. 99).[1]

The Court of Appeals below affirmed, holding that

[1]All italics in this Petition are ours.

the District Court, for the reasons given by it, had discretion to refuse to hear the petition for declaratory relief (R. 113).

REASONS WHY THE WRIT SHOULD ISSUE

1. By affirming the District Court's refusal to hear the prior declaratory action when the later action involved exactly the same parties and issues in another federal court and each action was equally capable of determining the controversy, the Fifth Circuit places itself directly in conflict with decisions of the Courts of Appeal for the Second, Third, Seventh, Eighth, Tenth, and District of Columbia Circuits. *Helene Curtis Industries v. Sales Affiliates*, 199 F.2d 732 (2nd Cir. 1952); *Cresta Blanca Wine Co., Inc. v. Eastern Wine Corporation*, 143 F.2d 1012 (2nd Cir. 1944); *Crosley Corporation v. Westinghouse Electric and Manufacturing Company*, 130 F.2d 474 (3rd Cir. 1942), cert. den. 317 U.S. 681; *Triangle Conduit & Cable Co., Inc. v. National Electric Products Corporation*, 125 F.2d 1008 (3rd Cir. 1942), cert. den. 316 U.S. 676; *Crosley Corporation v. Hazeltine Corporation*, 122 F.2d 925 (3rd Cir. 1941), cert. den. 315 U.S. 813; *Martin v. Graybar Electric Company*, 266 F.2d 202 (7th Cir. 1959); *New York Life Ins. Co. v. Roe*, 102 F.2d 28 (8th Cir. 1939); *Franklin Life Ins. Co. v. Johnson*, 157 F.2d 653 (10th Cir. 1946); *Speed Products Co., Inc. v. Tinnerman Products, Inc.*, 171 F.2d 727 (D.C. Cir. 1948). See also the concurring view of the Sixth Circuit, where dismissal only was involved, in *Maryland Casualty Co. v. Faulkner*, 126 F.2d 175 (6th Cir. 1942) and *Employer's Liability*

Assur. Corporation v. Ryan, 109 F.2d 690 (6th Cir. 1940).

This ruling presents a question of substantial importance to the uniform application of the Federal Declaratory Judgment Act, and one on which the Circuits are now divided.

The conflict between the Circuits may be illustrated by comparing the ruling below with the holding of the Court of Appeals for the Third Circuit in *Crosley Corporation v. Westinghouse Electric and Manufacturing Co.*, 130 F.2d 474 (3rd Cir. 1942), cert. den. 317 U.S. 681. The trial court below has held, and been affirmed by the Fifth Circuit, that even though it took jurisdiction of the declaratory suit before the accounting action was filed in the Southern District of New York, it has no duty to proceed to adjudicate the issues between the parties or to enjoin them from proceeding further in the New York suit. In square conflict, the Third Circuit held in *Crosley:*

> "Since the court below took jurisdiction of the declaratory suit before the infringement suits were filed in the district court in Ohio, even though but one day intervened, *it became its duty to proceed to adjudicate the issues* between the parties and meanwhile to enjoin them from proceeding further in the Ohio suits." (130 F.2d at 475).

Further, the court below held that proof that the declaratory action defendant had previously *threatened* to sue the declaratory action plaintiff defeats entitlement to declaratory relief if, after the declara-

tory action is filed, the defendant therein does institute suit in a different federal forum. In conflict, the Court in *Crosley* effectively held that the proof of such *threatened* litigation itself justifies invoking declaratory relief. 17 Temple University Law Quarterly 95, 96, is a law review note on *Crosley* which it summarizes in this way:

> "Although mere apprehension of suit is insufficient, the *threat* of an infringement suit *is ground for seeking declaratory relief.*"

2. The interpretation of the Federal Declaratory Judgment Act by the Court below is in conflict with the applicable decisions of this Court. The ruling below treats the declaratory judgment as a second class citizen among the federal judicial remedies. Citing this Court's decision in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, [which did *not* involve a declaratory action at all], the Court below judicially transmuted the defendant into a plaintiff and as a result of that transmutation bestowed upon her a preferential entitlement to choose a different forum even after the declaratory action had been filed:

> "Mrs. Marshall is the *real plaintiff* and *her* choice of forums is not to be lightly set aside." (R. 99).

Therein lies the expressly stated basis of the ruling here challenged. Such a view is in square conflict with the lesson of this Court's opinion in one of the first writs of certiorari issued to a Court of Appeals which had misinterpreted the Federal Declaratory Judgment Act. In *Aetna Life Insurance Company v. Haworth*,

300 U.S. 227, 244 (1936), this Court wrote:

> "It is the nature of the controversy, not the method of its presentation or the particular party who presents it, that is determinative."

The importance of maintaining the viability of the Declaratory Judgment Act again warrants close examination by this Court of a lingering reluctance to apply it. Twenty-six years ago it was observed that . . . "Some District Courts seem to have found difficulty in freeing themselves from the strait-jacket of the 'adversary' conception. They exhibit a tendency toward a narrow and technical interpretation of an Act intended to be construed in accordance with its broad and wise purpose." *Treemond Co. v. Schering Corporation*, 122 F.2d 702, 703 (3rd Cir. 1941). Time has not dulled the applicability of that observation within the Fifth Circuit.

A leading authority on declaratory judgments explained the rules limiting discretion involved here. "[T]he court's discretion is *not* properly used when the declaratory action is dismissed because the defendant might sue . . . in some future action. * * * There is no 'discretion' to refuse to assume jurisdiction over a case which is properly before the court and which is entirely appropriate for declaratory adjudication." Borchard, "Discretion to Refuse Jurisdiction of Actions for Declaratory Judgments," 26 Minn. Law Rev. 680, 684-685 (1942). "It is the adequacy or utility of the declaratory judgment, not of another remedy, which is determinative." Borchard, "Declaratory Judgment, 1939", 9 Brooklyn Law Rev. 1, 7

(1939). "Identity of issues and parties should foreclose the exercise of after-acquired federal jurisdiction." Borchard, Declaratory Judgments (2d ed. 1941) p. 659. Most courts accept Borchard's position. Action by this Court is required to achieve complete uniformity.

3. The lower court misapplied this Court's decisions.

The cases cited below to show declaratory suits are entertained with discretion (R. 112) (App. A., *infra* pp. 13-14) do not require the conflict among the Circuits created by the ruling below, nor do they justify that ruling. In *Kerotest Manufacturing Company v. C-O-Two Fire Equipment Company*, 342 U.S. 180, the declaratory action was filed *later* and did *not* involve *all* parties; in *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, there was only *one* action involved, which this Court said should not be heard because . . . "So fragile a record is an unsatisfactory basis on which to entertain this action for declaratory relief."; and in *Brillhart v. Excess Insurance Company of America*, 316 U.S. 491, the declaratory action was *subsequent*, not prior, to the other case, which was pending in a *state*, not a federal, court. These cases properly show circumstances warranting discretionary denial of declaratory relief. None of such circumstances is present in the case at bar.

Believing Amerada "anticipated" action by Mrs. Marshall, the Fifth Circuit noted one Court of Appeals decision to support its view that anticipation may be considered in denying relief (R. 113) (App, A., *infra* p. 14). Yet, that case, *Aetna Casualty and*

Surety Company v. Quarles, 92 F.2d 321 (4th Cir. 1937) involved two cases pending in the *same* court. The only court interpreting *Quarles* as the court below did was *reversed* for doing so in *New York Life Ins. Co. v. Roe*, 102 F.2d 28 (8th Cir. 1939). Moreover, the thought that by "anticipating" one forfeits declaratory relief is incomprehensible. Quite obviously, the precise purpose of the Declaratory Judgment Act is to permit a threatened party to submit the controversy for decision. Such submission necessarily "anticipates" a claim by the declaratory defendant. The Act serves no useful purpose if forum shopping declaratory defendants are allowed the control permitted in this action.

4. There is no equitable reason justifying federal refusal to hear the declaratory action. It was brought in good faith two years after unfulfilled threats. In the meantime, another action was deliberately brought excluding Amerada, although all three companies could have been joined in Mrs. Marshall's residence city. Amerada had but one forum available —Mrs. Marshall's own place of residence (28 U.S.C. §1391(a)). She has no business or family connections whatever with New York, but merely has the financial good fortune to be able to visit there at her pleasure. Records involved were moved from New York to Tulsa, Oklahoma, several years ago when Amerada fully absorbed the service corporation. There would seem to be but one reason to prefer New York—and the convenience of counsel for one party is not sufficient justification for defeating the purpose of the Declaratory Judgment Act.

CONCLUSION

In order to correct a serious conflict among Courts of Appeals, to remedy a departure from decisions of this Court, and to maintain the viability of the Declaratory Judgment Act and orderly administration of the federal judiciary, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Joseph W. Morris
George E. Erickson, Jr.
Cecil E. Munn

Dated October 26, 1967

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 24019

AMERADA PETROLEUM CORPORATION,
Appellant,

versus

BETTYE M. MARSHALL, *Appellee.*

Appeal from the United States District Court for the Southern District of Texas.

(July 31, 1967.)

Before HUTCHESON, GOLDBERG and DYER, Circuit Judges.

HUTCHESON, Circuit Judge: This appeal is from an order of the district court refusing to hear a petition for declaratory judgment. We affirm.

In 1948 appellant Amerada Petroleum Corporation, Continental Oil Company, and Marathon Oil Company agreed to organize jointly Coronada (sic) Petroleum Corporation whose purpose would be to acquire oil properties outside the United States. One Arthur A. Curtice was employed as the president of Coronada (sic) and he received as compensation a participating interest in properties acquired by Coronada (sic) dur-

ing his employment. Curtice assigned to appellee Bettye Marshall 10% of his participating interest as compensation for her job as his executive assistant. Coronada (sic) later acquired some oil properties in Libya. The instant case is part of the litigation which ensued when in September 1963 Mrs. Marshall informed Amerada, Continental, and Marathon of her intention to assert a claim to an interest in the Libyan production.

In 1964 Mrs. Marshall instituted suit in the United States District Court for the District of Columbia against Continental and Marathon, both doing business in that jurisdiction. Amerada, not amenable to service in the District of Columbia, could not be joined as party defendant in that action. Both Continental and Marathon moved to transfer the case to New York on the ground that it was a more convenient forum. The motion was denied.

Thereafter, on March 8, 1966, counsel for Mrs. Marshall wrote a letter to Amerada inviting it to appear voluntarily in the District of Columbia to the end that the litigation might be unified; Amerada was advised that if it chose not to appear, Mrs. Marshall would bring suit against it in a jurisdiction where it was subject to service. Approximately three weeks later Amerada filed the instant action for declaratory judgment in the Southern District of Texas. About 40 days later, Mrs. Marshall commenced suit against Amerada in the United States District Court for the Southern District of New York.

In response to the petition filed in the court below, Mrs. Marshall moved (a) to dismiss, (b) to transfer

to the District of Columbia or the Southern District of New York, or (c) to stay the declaratory judgment action pending the outcome of the suit she had filed in New York. The first two motions were denied, but the motion to stay was granted.

The district judge noted that the sole issue before him was whether he should hear the petition and declare the rights of the parties. The judge felt that the essential question that he was called upon to decide was whether the proper forum for the litigation between the parties was the Southern District of Texas or the Southern District of New York. In deciding that the latter is the proper forum, he emphasized his conclusion that the filing of the declaratory judgment action in the court below was triggered by the letter stating that Amerada would be sued by Mrs. Marshall if it did not appear in the District of Columbia as party defendant along with Continental and Marathon. Thus he did not regard as controlling the fact that the instant action was filed by Amerada shortly before Mrs. Marshall filed her suit in New York. See *Shell Oil Co. v. Frusetta*, 290 F.2d 689, 692 (9th Cir. 1961). Furthermore, New York was considered the more convenient forum on the grounds that it was the site of the execution of the contract, the work performed under the contract, and Coronada's (sic) principal place of business. On the other hand, the judge was of the view that the Southern District of Texas has no connection with the controversy other than as the residence of Mrs. Marshall, who is willing to make herself available for deposition and discovery in New York.

This is the type of case of which the Supreme Court has said:

> "The Federal Declaratory Judgments Act, facilitating as it does the initiation of litigation by different parties to many-sided transactions, has created complicated problems for coordinate courts. Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, *does not counsel rigid mechanical solution of such problems. The factors relevant to wise administration here are equitable in nature. Necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts.* (emphasis added)." *Kerotest Mfg. Co. v. C-O-Two Co.*, 342 U.S. 180, 183-4 (1951).

The district court clearly was vested with discretion in deciding whether to hear the declaratory judgment suit which involves the same parties and issues as Mrs. Marshall's action filed in a court of coordinate jurisdiction.[1] There is sufficient evidence to support the judge's finding that the instant action was filed by Amerada as the immediate result of the letter inviting it to appear in the District of Columbia. Amerada has been aware of Mrs. Marshall's claim since September 1963, yet it apparently did not feel compelled to seek a determination of its rights for over two years. That Amerada's petition for declaratory

[1] "The Declaratory Judgment Act was an authorization, not a command. It gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so." Public Affairs Associates, Inc. v. Rickover, 369 U.S. 111, 112 (1962). Accord Brillhart v. Excess Ins. Co., 316 U.S. 491 (1942).

judgment apparently was in anticipation of the New York suit is an equitable consideration which the district court was entitled to take into account. *Aetna Cas. & Sur. Co. v. Quarles*, 92 F.2d 321, 324 (4th Cir. 1937); *Seaboard Sur. Co. v. Texas City Ref., Inc.*, 109 F. Supp. 468 (D. Del. 1952). Compare *Crosley Corp. v. Westinghouse Elec. & Mfg. Co.*, 130 F.2d 474 (3rd Cir.) cert. denied, 317 U.S. 681 (1942).

Moreover, Amerada is not in the position of one who cannot obtain an adjudication of its legal rights; the only question here is in which of two jurisdictions should the adjudication take place. We cannot say that the judge acted outside the limits of his discretion in considering the factors which favor New York as the proper forum.

For the reasons given by the district judge, we affirm.

In view of this disposition of the cause, Mrs. Marshall's motion to dismiss is denied.

AFFIRMED.

(JUDGMENT)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1966

No. 24019

D. C. Docket No. CA 66-H-140

AMERADA PETROLEUM CORPORATION,
Appellant,

versus

BETTYE M. MARSHALL, *Appellee*.

Appeal from the United States District Court for the Southern District of Texas

Before HUTCHESON, GOLDBERG and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Amerada Petroleum Corporation, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Issued as Mandate: Aug. 24, 1967 July 31, 1967

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 66-H-140

AMERADA PETROLEUM CORPORATION,
Plaintiff,

v.

BETTYE M. MARSHALL, *Defendant.*

June 27, 1966

MEMORANDUM:

This is a declaratory judgment action. Presently for consideration is a motion by the defendant (a) to dismiss, (b) to transfer to the United States District Court for the District of Columbia or for the Southern District of New York, or (c) to stay the present proceeding. An understanding of the question requires the following brief summary of the background from which the litigation springs.

Mrs. Bettye M. Marshall, the defendant here, seeks to assert a cause of action against the Continental Oil Company, Marathon Oil Company and Amerada Petroleum Corporation. Mrs. Marshall is a resident and citizen of this District and Division. Continental is chartered in the State of Texas and has its principal place of business here. Marathon is chartered in the

State of Ohio and has its principal place of business there. The plaintiff Amerada is chartered in the State of Oklahoma and has a principal office there (alleged by Amerada to be its principal place of business), as well as a principal office in New York City (alleged by Mrs. Marshall to be its principal place of business). The cause of action which Mrs. Marshall seeks to assert, the merits of which are not of concern at this time, results from a partial assignment to her of certain contract rights accruing to one Arthur A. Curtice. Mr. Curtice, as president of Conorada Petroleum Corporation, which was owned in equal shares by Continental, Marathon and Amerada, was to receive an interest in oil produced from concessions in certain foreign countries. Substantial production was had in the Kingdom of Libya beginning in 1961-62. Mrs. Marshall contends that by reason of her assignment she is entitled to a portion of this Libyan production. The three oil companies deny this.

In June 1964 Mrs. Marshall instituted suit in the United States District Court for the District of Columbia against Continental and Marathon. Amerada was not joined as a party defendant because it was not amenable to service in that jurisdiction. From that date until the events noted hereafter there seems to have been a temporary truce between Mrs. Marshall and Amerada.

Continental and Marathon, in the District of Columbia action, disputed the venue in the District of Columbia by various motions, contending that the Southern District of New York was the proper forum.

After extended proceedings in the District Court, venue was sustained, and leave to appeal the interlocutory order denied by the Court of Appeals for the District of Columbia. See, *Bohanon v. Continental Oil Co.*, C.A. No. 1418-64 (D.D.C. 6/29/65).

On March 8, 1966, counsel for Mrs. Marshall wrote the president of Amerada advising him of the developments in the District of Columbia action and inviting Amerada to appear voluntarily there, to the end that the litigation might be disposed of in a single suit; and advising "If you do not so consent, we would then perforce institute suit against your company upon these claims in an appropriate jurisdiction where you are clearly subject to service and to the jurisdiction of the court." Amerada made reply to this communication by filing the present declaratory judgment action in this Court. A few days thereafter, Mrs. Marshall filed a direct action against Amerada in the Southern District of New York.

In her present motions, Mrs. Marshall argues that the declaratory judgment action is in the nature of a request for equitable relief; that it should be entertained only when the plaintiff has no other remedy for an adjudication of its rights. It is argued further that the entertainment of such action is discretionary and that under the circumstances noted above the action should be dismissed. Alternatively, the Court is asked to transfer the action for consolidation with the District of Columbia suit or with the New York suit. As a further alternative, the defendant asks that the instant case be abated pending outcome of the New

York action. Defendant relies principally on *Aetna Casualty and Surety Co. v. Quarles*, 92 F.2d 321 (4th Cir. 1937); *Seaboard Surety Co. v. Texas City Rfg., Inc.*, 109 F. Supp. 468 (D. Del. 1952); *American Tel. and Tel. v. Henderson*, 63 F. Supp. 347 (N.D.Ga. 1945).

Plaintiff Amerada argues that the declaratory judgment action is of equal dignity with the direct action involving the same cause of action, and that the authorities holding to the contrary are out of date; that Amerada has been subjected to this potential liability for an extended period and is entitled to an adjudication of its non-liability, and that being first in time compared to the New York suit, it is that action which should be abated. Amerada asks for an injunction to restrain Mrs. Marshall from proceeding with the New York case. Plaintiff further urges that the docket here is less crowded than in the Southern District of New York. Plaintiff cites *Maryland Casualty Co. v. Faulkner*, 126 F.2d 175 (6th Cir. 1942); *Samuel Goldwyn, Inc. v. United Artist Corp.*, 113 F.2d 703 (3rd Cir. 1940); *Carpenter v. Edmondson*, 92 F.2d 895 (5th Cir. 1937).

I am of the view that this Court is vested with a judicial discretion in entertaining a petition for declaratory relief, but that such relief should not be denied unless there be compelling reasons therefor. *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111 (1962); *Kerotest Mfg. Co. v. C-O Two Fire Equip. Co.*, 342 U.S. 180 (1952); *Eccles v. People's Bank*, 333 U.S. 426 (1948). I am further of the view that the

motion to transfer is not well taken. The declaratory judgment action might not have been instituted either in the District of Columbia or in the Southern District of New York by Amerada against Mrs. Marshall [*Hoffman v. Blaski*, 363 U.S. 335 (1960)], nor is the doctrine of forum non conveniens available, as there is no alternative forum wherein Amerada might have filed the suit. *Rodriguez v. Pan American Life Insurance Company*, 311 F.2d 429 (5th Cir. 1962).

However, reduced to its essentials, the question is one of venue, calling for a choice between the Southern District of New York and this District as the proper forum. When Mrs. Marshall files a cross-action here, as she of necessity must do, the parties and issues will be precisely the same. Each side argues that the forum that it advocates should be more convenient for the adversary. Amerada points out that Mrs. Marshall resides here. She urges that Amerada's principal place of business (or at least one of its principal places of business) is in New York City.

It appears that the Conorada-Curtice contract was executed in New York; that the work performed thereunder was done in New York; that Coronada had its principal place of business in New York and that much of the record evidence is located there. The Southern District of Texas has no connection whatever with the controversy other than the fact that it is the residence of the defendant, who is willing to make herself available for deposition and discovery in New York.

I am not impressed by the fact that the present case was filed a few days prior to the New York action.

Kerotest Mfg. Co. v. C-O Two Fire Equip. Co., 189 F.2d 31 (3rd Cir. 1951) aff'd. 342 U.S. 180 (1952); *Seaboard Surety Co. v. Texas City Rfg. Inc.*, supra. While I accept the statement of plaintiff's counsel that Amerada had considered and proposed for sometime to institute a suit for declaratory relief, and had employed counsel for that purpose, I cannot escape the conclusion that the action was triggered by the letter of March 8, 1966. Under these circumstances, I am of the view that the clear preponderance is in favor of New York as the site of trial. Mrs. Marshall is the real plaintiff and her choice of forums is not to be lightly set aside. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1946). This result should not be accomplished simply because Amerada is willing to assume the laboring oar as plaintiff, and because it beats its adversary to the punch by a few days, after a two year delay.

The motion to dismiss, and to transfer, is denied. However, this case will be abated and placed on the inactive calendar pending outcome of the proceedings in New York. In the event Mrs. Marshall does not pursue her remedy there with such diligence and dispatch as circumstances may permit, then the Court will entertain a motion to reinstate the present action on the trial calendar.

Done at Houston, Texas this 27th day of June, 1966.

/s/ Ben C. Connally
United States District Judge

(ORDER)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 66-H-140

AMERADA PETROLEUM CORPORATION,
Plaintiff,

v.

BETTYE M. MARSHALL, *Defendant.*

ORDER

This action came on for hearing before the Court upon the Defendant's Motion to Dismiss or to Transfer or Stay and upon the Plaintiff's Motion for Injunctive Relief. The Court duly considered the affidavits of Albert I. Edelman and of Elmer E. Batzell filed herein in support of defendant's motion and in opposition to plaintiff's motion, and the affidavits of Edwin S. Nail, Robert J. Stanton, and David N. Webster filed herein in support of plaintiff's motion and in opposition to defendant's motion.

The Court being fully advised in the premises, by briefs and oral argument of counsel for both parties, finds that, for the reasons set out in the Memorandum Opinion filed herein on the 27th day of June, 1966, defendant's said motion should be denied in part and granted in part and plaintiff's said motion should be and the same is hereby denied in its entirety.

It is therefore ORDERED, ADJUDGED, AND DECREED that:

1. Defendant's motion to dismiss this action or to transfer the same to the United States District Court for the District of Columbia or for the Southern District of New York be and the same hereby is denied to which action the exception of the defendant is noted.

2. Defendant's motion to stay further proceedings herein until the final adjudication of Civil Action File No. 1418-64 styled Bettye M. Bohanon v. Continental Oil Company and Marathon Oil Company pending in the United States District Court for the District of Columbia, be and the same hereby is denied to which action the exception of the defendant is noted.

3. Defendant's motion to stay further proceedings herein until the final adjudication of Civil Action No. 66-1342 styled Bettye M. Marshall, also known as Bettye M. Bohanon v. Amerada Petroleum Corporation, pending in the United States District Court for the Southern District of New York, be and the same is hereby granted, and the plaintiff herein be and it hereby is enjoined from proceeding further herein by way of discovery or request for trial setting; provided that, in the event the defendant herein shall not pursue her remedy in said pending New York litigation with such diligence and dispatch as circumstances may permit, then the Court will entertain a motion to reinstate the present action on the trial calendar, to which action the exception of the plaintiff is noted.

4. Plaintiff's motion to enjoin the defendant from further prosecuting her complaint in said Civil Action

in the United States District Court for the Southern District of New York and from taking any further action therein until final disposition of this action be and the same hereby is denied to which action the exception of the plaintiff is noted.

DATED AND ENTERED at Houston, Texas, this 28th day of July, 1966.

Ben C. Connally
United States District Judge